No. 15833

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM KLEIN, BERNARD B. STIMMEL and DAVID BLONDER,

Appellants,

vs.

RANCHO MONTANA DE ORO, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

APPELLEE'S REPLY BRIEF

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Los Angeles 14, Calif.

Attorney for Appellee
Rancho Montana de Oro, Inc.

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Your appellee, Rancho Montana de Oro, Inc., respectfully replies to the opening brief on appeal of the appellants, Bernard B. Stimmel, William Klein and David Blonder, herein as follows:

Actually the sole questions on appeal are these:

1. Did the trial court err in allowing

$350.00 to Simmel and Klein in addition to the $700.00 they had previously received as services for the corporation prior to proceedings in bankruptcy?

2. Was this adequate or more than adequate compensation for advising the corporation's president to have the corporation apply for relief under the Farm Act which had expired six years before, or to let the property be sold under a power of sale in a deed of trust?

3. Did the trial judge err in allowing Blonder $250.00 for one day's work getting out the papers for a Chapter XI proceeding and a stay of threatened sale under a second trust deed?

The appellants have attempted to befog the issue by an injection into the case of a purported late appeal from the order confirming the amended and new plan of arrangement.

Appellants themselves, although attorneys purporting to specialize in the practice of bankruptcy, never at any time filed any objections to the new plan of arrangement nor themselves ever made any motion in the court below to set aside the new plan of arrangement. Their sole effort was to get more money under the plan and to take its benefits. Not having received all that they wanted or asked for, they seek to attack it for the first time in this court. They are estopped from doing so.

They have also waived any right, if they

had any, to raise such objections on appeal.

In Leavit v. Glen L. Clark & Co. et al., 205 Pac. 2d 747, the court said:

> "When the invalidity of a contract has not been raised in the trial court it will not be considered on appeal. King v. Meyer, 35 Cal. 646, 649; Grimes v. Nicholson, 71 Cal. App. 2d 538, 542; 162 P. 2d 934; Title Insurance & Trust Co. v. Graham, 44 Cal. App. 2d 660, 662; Heesy v. Vaughn, 31 Cal. 2d. 701, 710, 192 P. 2d 753."

Had the plan of arrangement not gone into effect and fresh money supplied to bring the trust deeds, in default, up to date and current, and to pay off the unsecured creditors, the appellants would have been completely wiped out by a sale under the delinquent trust deeds. It would be inequitable to permit them to try in the trial court to get funds made available by the plan, and in this court, because the amount did not satisfy them, to seek to nullify the plan.

On September 9 and 10 and October 14, 1957, the appellants came into court, and were heard fully by the court on what they claimed were their services and what they thought these services were worth. The plan which put fresh money into the corporation, and removed the immediate danger of foreclosure, looked sweet and attractive to them, and they sought with avid and avaricious eyes to get the trial court, acting under the plan, to give them a good part of it. They voiced no objection to the

plan, made no motion to set it aside, and presented neither evidence nor argument, nor authority against it. Their sole effort was to get exorbitant fees. There was also a forwarding arrangement between San Francisco attorney Stimmel and Klein who passed on the actual legal work to Los Angeles attorney David Blonder. (R. 114).

Although Stimmel and Klein were served with copies of the proposed new plan of arrangement, Stimmel being served with two copies, and Blonder with a copy prior to the hearings, none of them showed up at the hearing of June 10, 1957, nor the ten days which followed nor at any time until September 9 and 10th. The trustee, who had moved to set aside the order confirming the plan, did not press it, presenting no argument against it on September 10 and September 11, 1957. (See docket entries and Reporter's Transcript). The trial court on each of these dates entered his order denying the motion to vacate and set aside the order confirming the plan. (R. 177. Docket entries). No appeal was taken by the trustee or anyone else from these orders.

STATEMENT OF FACTS

The facts, as presented by the records and files of this case, and the documents and exhibits in the court below, are as follows:

Rancho Montana de Oro, Inc., is a farm located in San Luis Obispo County, consisting of approximately 4487 acres of land of which

approximately 4000 acres was used for raising livestock and the balance under cultivation for the production of farm products. (Petition for restraining order filed January 5, 1956; See Appendix). All the stock of the corporation was owned by Irene Starkey McAllister, who operated the farm and ranch.

There was a first trust deed on the property in favor of Connecticut Mutual Life Insurance Company for $160,000, bearing five percent interest and a second trust deed in favor of the Pinole Land Company, owned and controlled by Leo Jarvis for $40,000, bearing eight (8) per cent interest per annum. Both first and second trust deeds also required reduction of the principal each year.

Because of a bad cattle season neither had been met, with the exception of an interest payment on each of the notes.

The taxes, approximating $4,000 annually had also not been met and were in default.

A number of obligations had also been incurred to unsecured creditors for farm equipment and necessities for farming the ranch, these being unsecured creditors in excess of thirty thousand dollars. (Docket of Federal Registry).

Mrs. McAllister, confronted with this picture, conferred with Stimmel and Klein, attorneys in San Francisco. She had previously sought refinancing from Leo Jarvis, a real estate dealer in Fresno, California. He had

advanced her $40,000 on a second trust deed, bearing eight percent, and had also secured from her a deed for one-half interest in the ranch, which deed he had placed in the name of the Pinole Land Company, a corporation largely owned and wholly controlled by him.

Mr. Klein testified: "I was acquainted with some people in San Francisco -- and I told Mrs. McAllister that it was a very difficult deal I didn't know what we could do with it, if anything; the time was running short; I told her if we did anything in the matter, I wanted $1500 cash retainer, which she said she didn't have, and we wanted a $25,000 fee or a one-quarter interest in the property, for our efforts." (R. 81)

Klein then said he tried to arrange some financing with brokers who represented "long-shot money" (R. 81) and was unsuccessful. He got Mrs. McAllister to mortgage her furniture to the extent of $1775 and received $700 for himself, out of it. (R. 86).

Mr. Stimmel contacted a Mr. Edelman, who went down and looked at the property, but was not interested in advancing money on a second trust deed, but that he would be interested in the purchase of the property at approximately $350,000. (R. 86). However, no actual commitment was made by or with him.

Following unsuccessful efforts at refinancing by Klein, Leo Jarvis holder of the second trust deed, advised that he was proceeding with a foreclosure sale. (R. 89) The sale was set

for January 6, 1956 at 11 a.m. at the Title Insurance and Trust Co. at San Luis Obispo.

Klein testified as follows: "If this foreclosure proceeding takes place, we are going to be in a bad way, we are going to be in a lots bigger muddle than ordinarily. 'I said: We should file proceedings under Chapter 75 of the Farm Relief Act' and while the Farm Relief Act had expired and had not been re-enacted by Congress, our courts were still accepting petitions under that Chapter." (R. 90).

He said they prepared an agreement giving her an option to pay either $25,000 in cash or a 25 per cent interest in the stock that was issued and outstanding of the corporation. (R. 92).

She accepted neither, but hurried to Los Angeles and saw David Blonder, and the next he knew, he testified, there had been a petition filed under Chapter XI in Los Angeles and the forced sale of the property by the Title Company on behalf of Leo Jarvis was restrained. (R. 93).

Mr. Blonder saw Mrs. McAllister January 5, 1956 "and reached the conclusion very quickly, although the people up north thought that perhaps a Section 75 proceeding should have been instituted, that because of the fact that Section had not been re-enacted some time previously, the only possible procedure, at least in my opinion, was the immediate filing of a Chapter XI proceeding and the obtaining of a restraining order, if possible." (R. 119) He also communicated the same day with Referee

Calverly. (R. 119) The petition was completed, served and filed shortly before five o'clock that day (R. 120). Mrs. McAllister took the papers herself, after herself paying the fee of $45. and served them. (R. 120).

On January 30, 1956 Mr. Jarvis moved to set aside the restraining order so that he could proceed with the foreclosure sale. Mr. Blonder did not appear but someone from his office appeared. He was in the case as counsel of record under March, 1956. (R. 122)

Mr. Blonder did not file any creditor's claim, but filed a petition as attorney. He testified "I recognize that any fees to which I am entitled are subject to approval of the court, and we of course are perfectly willing to accept any fees which the court feels are reasonable." (R. 124) After the trial court allowed him $250. he changed his mind.

Mr. Klein filed a creditor's claim on April 12, 1956 in the sum of $24,602.63. This claim was opposed by the trustee who on September 4, 1956 filed his opposition to the claim. The claim fails to itemize the services claimed to have been rendered. Neither the claim, nor the opposition, came on for hearing before the referee.

Blonder's plan of arrangement was rejected. On May 8, 1956 an amended plan of arrangement was proposed and later rejected.

On June 5, 1956 the referee filed an order of adjudication, and an order that bankruptcy be

proceeded with. (See Docket)

On July 16, 1956 the trustee petitioned the court for sale of the real estate. The petition alleged that the property had a gross value of approximately $250,000.

Two appraisers were appointed by the referee. Elmer Moody, an appraiser appraised the property at a gross value of $240,500. Richard L. Willett, an appraiser, appraised the property at a gross value of $230,000.

There was then due on the property $160,000 plus interest on the first trust deed, $40,000 plus interest on the second trust deed, unpaid taxes in the sum of $8000. and unpaid unsecured creditors in excess of thirty thousand dollars.

The referee took testimony as to whether this was a farming corporation, and concluded that it was a farming corporation, and although all the stock was held individually by Mrs. McAllister who had operated the farm individually, the court held that the corporation was not her alter ego and that a corporation was not entitled to the exemptions from bankruptcy of an individual farmer. Sec. 379, Bankruptcy Act. A petition for review followed.

During the pendency of this review the referee withheld sale of the property in bankruptcy. But on March 7, 1957 the Connecticut Mutual Life Insurance Company, holder of the first trust deed, filed notice of default in the office of the recorder at San Luis Obispo,

pursuant to State procedure under the laws of the State of California, and made demand for the payment of the whole amount due under its agreement. The property was then in jeopardy of being sold out under the power of sale under the first trust deed after June 7, 1957, thus wiping out all other creditors, including appellants purported claim.

On May 28, 1957 Morris Lavine deposited fresh money in the federal court which Connecticut Mutual, holder of the first trust deed, was willing to accept and bring its two-year delinquent trust deed up to date, as was also Leo Jarvis, holder of the second trust deed, making them current upon the payment of the same. (See docket of deposits in the Federal Registry).

On May 29, 1957 a proposed new plan of arrangement, proposing to bring the secured creditors up to date and to pay all delinquent taxes and to pay the unsecured creditors in full was presented to the court with a request for leave to file the same. The district judge granted the request and set the hearing for June 10, 1957 at 11 a.m. (See Docket). It was necessary to set the hearing as close to June 7th as possible to cure the default notice of Connecticut Mutual, which neither the trustee nor his attorney had restrained.

The copies of the proposed plan of arrangement were printed, with a place for consents of the debtors on the last page thereof, and were mailed out to all creditors. Some of the mailings were on a different date, than others, but all creditors who were listed or known, and all

parties in interest who were listed or known were served. Mrs. McAllister personally sent a copy of the proposed plan to Mr. Stimmel, which was in addition to the other copy sent out by Mr. Lavine. David Blonder was also served with a copy prior to the hearings and has never questioned the service on him.

On May 29th, 1957 Mr. Lavine also deposited with the clerk of the federal court the sum of $25,677.44, the amount which Connecticut Mutual had asserted previously in open court, was the amount due them to bring up the trust deed current. He also deposited $16,400, claimed by Leo Jarvis to bring up the second trust deed to date. He also deposited $30,000 to pay unsecured creditors their claims. (Docket entries of May 29th). These corporations and individuals were notified that the money was on deposit.

Copies of the new plan of arrangement were received by the creditors who returned them with their consents, or their attorneys wired consents.

On June 10, 1957 the district court held its hearing on the plan. Neither Mr. Blonder, who practices law in Los Angeles, nor Stimmel and Klein, whose offices had received two copies of the proposed plan appeared, in person, by letter or otherwise.

At this hearing, the trustee asked to have Ernest Utley appointed as an additional counsel for the trustee. The court granted his request. Mr. Utley immediately began a series of objections to the plan.

The only unsecured creditor who appeared in court was Leo Jarvis, who had a $1500 unsecured claim, as well as his $16,400 secured claim. He consented to the plan in open court.

The attorney for the trustee, Mr. Utley, sought to delay the proceedings, sought to have them transferred back to Referee Calverly, and conducted other maneuvers designed to defeat the plan.

Gerald Hagar, representing the Connecticut Mutual, urged the court to approve the plan, as it was the first time that the creditors had seen any real money. The court granted the motion to approve the plan, but stated he would allow time for any objections thereto, to be filed and retained jurisdiction to decide them. NONE WERE FILED WITHIN THE TEN DAY PERIOD WHICH FOLLOWED. (R. 20-21).

AS A MATTER OF FACT, NONE WERE EVER FILED IN THE DISTRICT COURT BY ANY CREDITOR TO THIS DATE.

On June 21, 1957 a petition to confirm the new plan of arrangement was filed with the district court, and approved by him, retaining jurisdiction to hear any objections. The order was entered on June 25, 1957.

On June 27, 1957 the trustee filed objections to the proposed order approving the plan of arrangement. This was seventeen days after the trial judge had held the hearing and allowed

ten days time to pass for anyone to file objections. On July 1, the trustee filed objections to payment of creditor's claims of 100 cents on the dollar. This was twenty-one days after the date the court heard the matter and waited ten days time for objections. These objections were filed by the trustee after Connecticut Mutual Life Insurance Company had been paid $27,998.15 on their loan on June 27, 1957 (see Docket of Register) making their loan current and not in default. There was also sent to Leo Jarvis the sum of $16,400. More interest was due him due to the delay, and he was paid additionally the sum of $213.71. The county tax collector of San Luis Obispo was also paid $12,001.73. On June 26, 1957 following the confirmation of the plan and no objections filed within the time awaited by the court, and the entry in the court's records as of June 25, 1957 the following unsecured creditors were paid one hundred cents on the dollar, some of them with interest: Joseph Rosenberg, $2750.; George Sousa, $8,250.; Pat E. Milligan, $583.26; William W. Warren, $3,885.09; C. H. Brandt, $3,283.24; Taylor Walcott, $2,530.12; Walter J. Goodell, $1,977.71; Morosa Bros. Transportation (cattle) $3,379.54; Leo Jarvis, $1,500.; Paul Noyes $780.; Farmers' Hardware, $202.41; Leon Mumford, $600.; T.O. Waer, $2,107.52; Paul W. Lyles, $631.63. (See clerk's docket).

The court on July 12, 1957 continued the hearing on the matter of the trustee's objections, attorneys fees, receiving the final report, etc., to September 9, 1957.

Stimmel and Klein, and David Blonder

appeared in person at that time in a hearing on application for fees. No objection was made by them at that time to the new plan of arrangement, nor did they ask the court to consider the trustee's objections as their own. Rather they sought fees under the plan with money now available. The matter was continued to September 10th, 1957 at which time the court heard Mr. Stimmel and Mr. Klein's claim fully as to the purported value of their services.

William Klein testified on September 10th, stating in substance that he had advised Mrs. McAllister, president of Rancho Montana de Oro, Inc., to proceed under the Farm Act, Section 75, which had expired in 1949. (R. 90) He also told her that Mr. Stimmel had a friend who was interested in buying the place at a foreclosure sale. (R. 86) They received $700 in cash, resulting from a loan on furniture. Mr. Klein wanted $1500 at once, and wanted $25,000 or one-fourth interest in the property. She left him and came to Los Angeles where she saw David Blonder, who said the Farm Act would not apply, and he redrew the petition under Chapter XI. Mr. Blonder spent one day preparing the same and getting a restraining order, heading off the sale set for the next day.

Klein gave his opinion that the reasonable value of his services were $25,000, although he had failed to get any money to rehabilitate the ranch and although he had not filed any papers, not even under the expired Farm Act. He left in a hurry for an airplane, (R. 129) as he had other commitments in San Francisco.

Morris Lavine, attorney-at-law handling bankruptcies, testified that Klein's services were worthless to the estate (R. 166 and 167), that advising a client to apply under the expired Farm Act Chapter 75 would have permitted sale under the deed of trust, and lost the property for appellee. He also testified that Blonder was entitled to a reasonable fee for one day's services, as determined in amount by the court (R. 167) He also submitted his contract with Irene Starkey McAllister to the court. (Exh. 5).

Nothing was said either by way of motion, evidence, argument, or discussion as to the trustee's motion to set aside the order confirming the plan of arrangement by appellants or anyone, except that Morris Lavine, attorney for the appellee asked the court to rule on the motion and dispose of it. The trustee's attorney made no objection. The court then denied the motion to set aside the order confirming the plan (September 10, 1957), and entered it in the minutes and docket. It again did so on September 11, 1957, and continued the other matters as to fees of attorneys to October 14, 1957. At that time further cross-examination of Morris Lavine was permitted to William Klein and the matter of fees was submitted. (R. 183)

Because the attorney for the trustee thought all orders in bankruptcy ought to be in writing the district court directed Morris Lavine to prepare a written order with reference to his denial of the trustee's motion to set aside the order entered June 25, 1957 approving the new plan of arrangement.

On October 21, 1957 the court rendered its judgment regarding attorney fees. It made ultimate findings that Stimmel and Klein be allowed to keep the $700 they had previously collected and that they be allowed $350. additional. It also found that Blonder's services were of the value of $250. It found that Morris Lavine's contract was fair and equitable and not in violation of any law (Order of October 21, 1957).

On October 25, 1957, the court entered its judgment again denying the motion of the trustee to set aside the order and judgment of June 25, 1957 approving the new plan of arrangement, and reserved further jurisdiction. The clerk of the court, as shown by the docket, sent out notices to all attorneys.

On November 29, 1957 Roy B. Woolsey, who had been a stranger to the entire proceedings, and who was not substituted into the case, filed a notice of appeal from the order of June 25, 1957 and from the fees fixed for Stimmel and Klein and Blonder.

On or about December 20, 1957 the three attorneys filed affidavits that Woolsey was now representing them.

A motion to dismiss the appeal as to the first ground was reserved by this court until hearing on the merits of the appeal re the attorneys' fees.

We now renew our motion to dismiss the first ground of appeal for the following reasons:

1. Neither Stimmel and Klein nor

Blonder objected to the plan in the court below. Only a creditor can object to a composition or plan of arrangement. In re Downtown Wet Wash Laundry, 53 Fed. 2d 133. None was ever made by Stimmel and Klein or Blonder AT ANY TIME in the district court. Nor did they ever themselves make any motion to set aside the plan.

2. The trustee's duties do not encompass making objections to a plan of arrangement in which defaulting trust deeds and taxes are to be brought up to date so that the property is not sold out from under the unsecured creditors which would wipe them out, and $30,000 in cash is deposited to pay off unsecured creditors one hundred cents on the dollar.

3. No appeal was taken by anyone from the order of June 25, 1957 confirming the plan of arrangement. That appeal had to be taken within forty days after its entry. In re Acqua Hotel, 251 Fed. 2d 138.

Pfister v. Northern Illinois Finance Corporation, 317 U. S. 144; 87 L. Ed. 146:

> "A refusal to modify the original order, however, requires the appeal to be taken from the original order, even though the time is counted from the later order refusing to modify the original order."

4. The trustee did not present any evidence, argument, or press his motion to vacate the order of June 25, 1957 when it was heard on September 10 and 11. Nor did he express any dissatisfaction, or anything at all,

when the court passed upon it. Nor did he appeal or file notice of appeal from the order denying his motion. The present appellants are in no position to step into the trustee's position in order to prosecute an effective appeal, or his earlier denied motion, unappealed from.

5. The appellants sought to take advantage of the benefits of the plan which provided money and still seek to take this advantage. They were and are only in a position to collect what the court below awarded them because the plan is in operation, and they, along with other unsecured creditors have not been wiped out by the sale of the property under the power of sale in the deed of trust. They came into court with their claims and the court heard them fully. They cannot in the court below proceed under the plan to seek money, and when dissatisfied with the amount, seek relief in this court by attacking the plan.

6. In view of the fact that the appellants themselves never filed any objections to the plan, never themselves moved in the court below to set it aside, never presented any argument thereon, this court is without jurisdiction to hear or entertain their appeal on this ground.

We now come to each of the arguments of appellants:

I.

APPELLANTS ARE IN NO POSITION TO ATTACK THE NEW PLAN, WHICH THEY NEVER THEMSELVES OBJECTED TO IN THE COURT BELOW. THEY CANNOT RAISE THE ISSUE FOR THE FIRST TIME IN THIS COURT. ONLY A CREDITOR CAN OBJECT TO A COMPOSITION OR PLAN OF ARRANGEMENT. HE MUST DO SO IN WRITING, SET OUT THE GROUNDS, SET IT DOWN FOR HEARING AND HAVE THE COURT BELOW PASS UPON IT. APPELLANTS THEREFORE HAVE NO JUSTIFIABLE OR APPEALABLE GROUNDS OF ATTACK ON THE PLAN.

In In re Downtown Wet Wash Laundry, 53 Fed. 2d 133, the court said:

> "The rule is, and ought to be, that only creditors may oppose confirmation of a composition."

Since Stimmel and Klein and Blonder never opposed confirmation of the plan, did not move to set it aside, and presented nothing in the trial court thereon they are without jurisdiction to attack it in this court.

The contract between Attorney Lavine and the debtor, which was incorporated in the plan of arrangement is not violative of §155, U. S. C. Title 18 or General Order 42 or §29 of the

Bankruptcy Act, 18 U. S. C. A. par. 154.

The statement and analysis of the plan of arrangement by appellants are, to put it mildly, misleading.

The plan called for fresh cash in an amount to bail out the corporation from its ruinous liabilities, which made its stock worthless. Bearing in mind that $200,000 principal was owing to the first and second trust deed holders and in default, two years; that $15,970 was owed to the first trust deed holder for interest; that $1600 was owed in interest to the second trust deed holder; that about $12,001 was owed in delinquent taxes and more than $30,000 was owed to unsecured creditors or in excess of $260,000 owed, and the highest appraised value of the property was $240,500 by the referee's appraiser, the injection of $85,000 into the corporation on a third trust deed, bearing 6 per cent interest, could not by any stretch of the imagination be violative of the Title 18 §§154 and 155.

ALL THAT THE CORPORATION GAVE FOR THIS $85,000 and other financial support was a third trust deed, and a note bearing 6 per cent interest, not payable for ten years unless the property is sold, and no interest to be paid on the same for three years. No part of the assets of the corporation were paid to Morris Lavine, and none was agreed to be paid. The statement of respondent that Morris Lavine was acquiring an interest in the assets of the debtor's estate is therefore wilfully and deliberately false.

Furthermore, it was the corporation, and not Mrs. McAllister that was in bankruptcy, and needed to be bailed out. Her stock was never an asset of the bankrupt corporation. Of course she personally wanted to protect her stock and make it worth something.

A corporation is a separate entity from the stockholders. Erkenbrecher v. Grant, 187 Cal. 7; 200 P. 841.

In Merton L. Miller, Respondent, v. Charles J. McColgan, as Franchise Tax Commissioner, etc., Appellant, 17 Cal. 2d 432, 436, the Court said:

> "[1] It is fundamental, of course, that the corporation has a personality distinct from that of its shareholder, and that the latter neither own the corporate property nor the corporate earnings. The shareholder simply has an expectancy in each, and he becomes the owner of a portion of each only when the corporation is liquidated by action of the directors or when a portion of the corporation's earning is segregated and set aside for dividend payments on action of the directors in declaring a dividend. This well-settled proposition was amplified in Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 81 [46 Sup. Ct. 256, 70 L. Ed. 475], wherein appears the following cogent language: 'The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the

corporation, as they may be declared in dividends arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property.' Since the shareholder by reason of his stockholding is entitled to share in any dividends which may be declared, it logically follows, as appellant urges, that the source of dividends is the stock, because income which comes to one solely because of ownership of property has a source in that property."

Furthermore, the contract between Mrs. McAllister and Mr. Lavine was for her stock, individually owned, and not a corporate asset. She was not in bankruptcy.

The referee had already held that the corporation was not her alter ego. That doctrine has no application to the facts here.

The contract between Mr. Lavine and Mrs. McAllister, however, was strictly for financing and aid in operating the ranch and obtaining other business contracts, such as an oil lease, grazing contracts, etc., for the ranch. The contract further provided for a salary for Mrs. McAllister of $500 a month. In entering into the contract, Mr. Lavine dealt with her through two able counsel of her choice -- Ted James Kukula of San Francisco and

Maurice Goodman of Los Angeles. The contract was submitted to the district judge for his examination for its fairness and equitableness, and that court found it to be fair and equitable. (The contract is Exhibit 5 in evidence).

Morris Lavine waived all attorneys' fees, and did not claim any, and so testified. (R. Tr. 164)

But Mrs. McAllister (now Mrs. Starkey) has not complained and does not complain. Appellants act as if they were still her attorney and attempt to set aside the personal contract by which she managed to save the corporation and pay up secured creditors, pay taxes, pay the unsecured creditors, infuse value into her valueless stock, and get herself a salary of $500 a month.

Of course if they were to succeed in setting aside the plan then the corporation would have to repay Mr. Lavine the money had and received by it, and it would again face a condition in which Mr. Stimmel's friend, Mr. Edelman, might have a chance to buy it. This would be an inequitable result in a court that acts upon equitable principles.

Unlike Mr. Lavine's agreement for half of Mrs. McAllister's personally owned stock for a refinancing deal, Mr. Klein asked for one quarter interest in the property for his efforts (R. 81, 104). Do appellants come into this court of equity with clean hands?

Appellants make such misleading statements as "this contract in effect was tantamount to a transfer by the debtor to Attorney Lavine of an interest in the bankruptcy assets." "The contract between the debtor and its attorney Morris Lavine was void." (R. 54).

The corporation -- the debtor or bankrupt -- never transferred anything to Mr. Lavine. Its only contract with Mr. Lavine was a third trust deed for a loan of $85,000, payable at the rate of six per cent (less than present bank rates of loans on real estate) with no interest payment due for three years. Appellants surely do not contend that the loan which saved the corporation is void.

Mr. Lavine agreed to and did obtain a valuable oil lease with Tidewater Oil Company, dating it back to the time when the trustee should have obtained it and didn't, and Mr. Lavine also negotiated and drew grazing leases for the corporation -- all without any charge for legal expenses.

We have gone at great length to explain the deal to the court, because of the malicious and unjustified attack upon Morris Lavine who came up "with dollars and money" to save the corporation from bankruptcy where the appellants had failed. (Test. of David Blonder, R. 122).

The court therefore was fully justified and correct in ratifying the contract between Morris Lavine and Irene Starkey McAllister,

not a bankrupt, concerning her individually owned stock. She realized that half of something of value was worth more than all of nothing. She had previously entered into a similar deal with Leo Jarvis, a real estate broker, who had advanced $40,000 on a second trust deed, bearing 8 per cent, but he did not take up the other indebtedness, and there were other differences, and appellee made an agreement with him cancelling out his deed for half interest of the property. For other reasons not relevant here he agreed to cancel his deal.

Appellants therefore have no justiciable interest or legal ground for their contention on this point, and have used it as a possible threat to appellee to delay the successful operation of the plan and to settle their unjustified claim for an exorbitant price.

II.

APPELLANTS WERE GIVEN ADEQUATE NOTICE, AND A FULL HEARING ON THREE DIFFERENT DAYS. THE PURPOSE OF NOTICE IS TO AFFORD A HEARING TO ANYONE WHO WISHES TO BE HEARD. THESE APPELLANTS WERE FULLY HEARD, AND HAVING APPEARED AND BEEN HEARD WAIVED ANY OBJECTIONS REGARDING NOTICE. FURTHERMORE WHEN THEY DID APPEAR THEY DID NOT OBJECT TO THE PLAN, BUT SOUGHT BENEFITS UNDER IT, AND THEREFORE IMPLICITLY RATIFIED IT.

As we pointed out in our statement of facts shown by the record, Connecticut Mutual Life Insurance Company recorded notice of default and intention to sell under its deed of trust on March 7, 1957. Therefore, unless something was done within three months as provided by California law, the whole amount of indebtedness of $160,000, plus interest became payable. This would have defeated any plan. Funds to carry out the plan became available May 29, 1957 and were deposited in the federal registry with the court (See Register Account, Appendix A). The Court therefore set the hearing date on the plan for June 10, 1957, and copies of the plan were promptly sent out, as soon as the printer got them off the press. A copy was mailed to Stimmel and Klein at their San Francisco offices by Morris Lavine. A second copy was mailed to Mr. Stimmel by Mrs. McAllister, prior to the hearing, and

acknowledged to her by him. A copy was also mailed to David Blonder at his Los Angeles office prior to the hearing of June 10, 1957 and Klein had a forwarding arrangement with Blonder. (R. 114).

Blonder, the attorney to whom Stimmel and Klein forwarded the case (R. 114) with offices eight or nine blocks from the Federal Building, did not appear. At no time did he contend that he did not have adequate notice, or that he could not have appeared to act for himself or his forwarding attorneys. Nor did Stimmel and Klein appear either in person or by writing.

At the hearing which did occur on June 10, 1957, three days beyond the date when the default on the first trust deed had to be made good, Connecticut Mutual Life Insurance Company, appeared through its attorney, Gerald Hagar, and agreed to accept the arrangement and make the trust deed current by the payment of delinquent payments and interest and expense. (R. 17). L. Kenneth Say, attorney representing Leo Jarvis, owner of the second deed of trust, in default, was also in court, and approved the agreement to bring their trust deed up current and that it was acceptable to his client. (R. 6).

The court then reserved jurisdiction to hear objections and said he would hear anyone who had objections.

The court was frankly confronted with

the same problem that frequently confronts it with perishable, shrinking or destructible assets. In these circumstances Congress has given the court the power to act quickly and to conduct a sale of the assets even without notice. Here, the court had to act, quickly, to prevent the secured creditors from selling under their power of sale, thus destroying any chance of the unsecured creditors getting even a dollar.

The trial court stated he would give anyone who objects a hearing. In the proceeding of June 10th, 1957 the trustee's attorney seemed mainly concerned with Stimmel and Klein's claim. He was repeatedly looking for something to defeat the plan. There can be no doubt that he immediately contacted them. (R. 15) Eleven days elapsed before a petition was filed to confirm the plan, and fifteen before it was entered. No objection was made during that time by appellants themselves, nor even later. The trustee filed objections on June 27th, two days after the plan was confirmed, but not Stimmel and Klein or Blonder.

A hearing on all matters went over to September 9, 1957 when Stimmel and Klein and David Blonder first appeared and were given a full hearing on September 10th and September 11 and October 14, 1957. AT NO TIME DID THEY RAISE THEIR VOICE EVEN ONE SYLLABLE AGAINST THE PLAN. Their only concern was for more money for attorneys' fees.

By their appearance and being accorded a full hearing they waived any objections to notice.

As stated in In re Gurwitz v. Wise, 122 Me. 444, 120 Atl. 536, the object of notice is to protect the rights of creditors.

> "If they had actual knowledge of the proceedings in time to do this, equal protection is afforded them."

The court pointed out that the plaintiff had actual knowledge in the case in ample time to protect his rights.

> "He received notice and in time to have participated in all of the material proceedings and to have secured his proportionate share of the estate."

Appearance and participation are waiver of notice. Matter of Inter-City Trust Co., 295 Fed. 495, cert den. sub nom Neal, 265 U.S. 589.

Even if there is any doubt about the validity of the court's action in a given case of dispensing with notice, an objecting party's appearance and participation before the court in a discussion concerning such sale before its consummation is a waiver of any rights to assert such invalidity. See Matter of Inter-City Trust Co. supra.

On September 10, 1957 the trial court gave Stimmel and Klein a full hearing. Before the hearing was concluded, Klein said he had a plane reservation for 5:15 (R. 95). David Blonder, of Los Angeles, remained. There was no indication that the hearing had concluded,

and at the close of the day the court adjourned until the following day. Neither Stimmel and Klein, nor Blonder showed up. But Utley, and Morris Lavine appeared and continued the hearing, as necessary. Stimmel, Klein and Blonder chose to absent themselves without any concern as to what other testimony would be put on. Why they thought their extravagant claims for fees would go uncontested is unknown. But in any event, the court again accorded them the right to cross-examine Morris Lavine on October 14, 1957 and before ruling on their claims. (R. 181).

III.

THE TESTIMONY OF APPELLANTS WAS CONTRADICTED BY THE ATTORNEY FOR THE DEBTOR CORPORATION. THE TRIAL COURT, CONSIDERING ALL STANDARDS CHOSE TO APPLY ITS OWN YARD-STICK OF THE VALUE OF APPELLANTS' SERVICES. THE DETERMINATION OF THE AMOUNT OF FEE WAS A FACT FOR THE TRIAL COURT'S DETERMINATION. THERE WAS NO ABUSE OF DISCRETION.

The appellants continually seem to fail to understand or recognize that in California a corporation and its stockholders are separate entities. Erkenbrecher v. Grant, 187 Cal. 7. It is the corporation, and not its stockholder, who was and is in the bankruptcy

court. Morris Lavine, as attorney for the corporation, appeared in opposition, and testified as to the lack of value of appellants' services (R. 161). Appellants at no time moved to strike it, but cross-examined on the basis of it. The trial judge had a right to decide what probative force he would give to any or all of the testimony.

The testimony of Mr. Lavine was that Mr. Klein's services were valueless to the estate. (R. 166, 167). He also expressed the opinion that Klein should be compelled to return some of the $700 he received. (R. 167). The trial judge did not reject Mr. Klein's claim in toto or order him to return some of the money he received prior to bankruptcy. The trial judge allowed him to retain the $700. and allowed $350. additional. Had bankruptcy proceeded with, it is doubtful if he would have ever received this additional amount.

In matters of attorneys' fees, judges are able to fix the same from their general experience and knowledge, taking into consideration the nature of the work, the benefits or lack of benefits to the estate, the success or failure of accomplishment. Bearing in mind that the debtor in this case was the corporation, the efforts of Stimmel and Klein were of no benefit to it. Rather, their services jeopardized the corporation's property, as they recommended a procedure under the expired §75, the Farm Act, which went out in 1949.

What then is the reasonable value of legal services by an attorney who recommends

to an officer of the corporation that it proceed under an act that had expired six years before?

Supposing a client came to a lawyer to take an appeal six years after the time for filing notice of appeal. Or supposing some woman sought advice of a lawyer regarding a breach of promise suit in California after the law expired, and he told her to file it anyhow. What would the value of such legal services be?

In this case, the situation would be far more serious. Connecticut Mutual was ready to sell under the power given it in the first trust deed and Jarvis was waiting to foreclose on his second trust deed. A petition under the non-existent Farm Act would not have restrained the sale, and the corporation's assets would have been sold under the hammer. The value of such advice and services? Nil.

As a matter of fact we think such advice would have justified a suit for negligence, if it had not been cured by the filing of a Chapter XI proceeding.

The underlying rule is that services rendered must be valuable to an estate, and not to an individual client. Giving business advice is not compensible.

In Re Chicago M. St. P. & P. R. Co.
138 Fed. 2d 433;

Rauscher v. Northern Cities Gas Co.,
41 Fed. Supp. 566;

Teasdale v. Sefton Nat. Fibre Can Co., 85 Fed. 2d 379.

Taking the standard which appellants themselves have quoted from Dee v. United Exchange Building, 88 Fed. 2d 372, -- we submit that $1050 for the services was more than reasonable or justified. It appears from Klein's testimony that his time was spent in an unsuccessful effort as a financial broker seeking finances. These, like real estate broker's efforts, are always contingent on success, and he was unsuccessful in his efforts to get financing. His total legal services appears to consist in advising the president of the corporation to proceed under the Farm Act, which had expired six years before his advice. Apparently he did not even take the time or trouble to research the law on that subject. When it came to the law work itself he sent the corporation's president out of the office to David Blonder, (R. 103, 104) with the papers of some kind of a plan under the expired Farm Act. (R. 104). Blonder knew the Farm Act would not apply and prepared a Chapter XI proceeding.

That part of the statement of appellants underlined here that "the testimony of the appellants on the value of their services was not contradicted either by the president of the debtor corporation or by any other witness" is therefore false.

An affidavit, filed by the president of the corporation, regarding the services of Stimmel and Klein, is as follows:

IRENE STARKEY McALLISTER, being first duly sworn deposes and says: That she is the President of RANCHO MONTANA DE ORO, INC., a California corporation, debtor named in the above proceedings. That RANCHO MONTANA DE ORO, INC., was not and is not indebted to Bernard B. Stimmel in the sum of $24,602.63, or in any lesser or greater sum, or at all. That Bernard B. Stimmel is an attorney located in San Francisco, California; that affiant saw Bernard B. Stimmel on or about the first week of December, 1955, for the purpose of seeing what could be done to refinance RANCHO MONTANA DE ORO, INC.; that Bernard B. Stimmel undertook to get the ranch refinanced and requested a fee of one-fourth (1/4) of the ranch property if he was successful in getting the ranch refinanced. That said B. B. Stimmel did not get the ranch refinanced and did not perform any services of value to RANCHO MONTANA DE ORO, INC.; that at no time were his services of any value or of benefit to RANCHO MONTANA DE ORO, INC., but, on the contrary, were of a nature that were, in fact, injurious to the ranch and caused the threatening of the foreclosure of the ranch property so that it was necessary for RANCHO MONTANA DE ORO, INC. to secure other attorneys to file under Chapter Eleven and prevent foreclosures of existing liens. That Bernard B. Stimmel and William Klein received $700.00 from Irene Starkey McAllister in cash, for which they performed no service of

value. That if a hearing is held in connection with the claim of Bernard B. Stimmel, that the Court is therefore requested to re-examine the services and to order the refund of the sum of $700.00 to Irene Starkey McAllister, and for any and all damages caused by the conduct of said attorneys.

Morris Lavine, attorney for Rancho Montana de Oro, Inc., (R. 161) and at the time of testifying, secretary of Rancho Montana de Oro, Inc., (pursuant to agreement carried out under Exhibit 5), testified that Mr. Klein's services were of no value to the estate, that they proved of no benefit to the estate, and that the $700. already received was far beyond the services rendered. (R. 167).

The trial court was best in a position to appraise the value of these services, and gave Stimmel and Klein $350. additional.

As the Circuit Court (2nd Circuit) said In re Paramount Merrick, Inc., 252 Fed. 2d 482:

> "The attorneys, Finkel and Nadler, complain that the fee of $500 awarded by the Bankruptcy Court is unreasonably low. In support of this contention they refer to their application for an allowance of $3,500. There they swear that they performed a variety of services for the benefit of the estate, including obtaining permission to continue the assignee sales and attending both sales subsequent to the filing of the bankruptcy petition, the procurement of a favorable bulk bid on

the fixtures at Levittown, the negotiation of two landlord use and occupation claims arising out of the bankrupt's occupancy of stores on two sites, negotiations involving six secured claims, the preparation of papers, conducting of an examination of the bankrupt's president, attendance at a creditors' meeting, and the answering of 'innumerable inquiries' of creditors during the period from August 23, 1956 to November 14, 1956. The attorneys contend that the continuance of the sales saved the estate approximately $1,680, that the Levittown bulk bid netted an additional $9,000, that their adjustment of landlord claims saved $784.29, and that successful rejection of a secured creditor's claim for counsel fees effected a saving of $900. They thus claim that over $12,000 of the $19,511. net value of the estate was due to their efforts. Unsecured claims total approximately $62,000. Appellants aver that $500 does not cover clerical and stenographic expenses.

[4] The attorney for the receiver is entitled to reasonable compensation for his services during the period of receivership by virtue of the Bankruptcy Act, 11 U.S.C.A. §§102, 104, sub. a(1). The principal factors which enter into a determination of what is reasonable are the time spent, the intricacy of the questions involved, the size of the

estate, the opposition encountered, the results obtained and the "economic spirit" of the Bankruptcy Act to curtail unnecessary expenses. Levin v. Barker 8 Cir., 1941, 122 F. 2d 969, cert. den. 315 U. S. 813, 62 S. Ct. 799, 86 L. Ed. 1212.

[5, 6] The attorneys' services were considered by the referee. He was best able to pass upon their worth to the estate and his determination was accepted by the Bankruptcy Court. Although we have jurisdiction to review the compensation, 11 U. S. C. A. §47, we are reluctant to overturn the determination unless it can be shown that the allowance was arbitrary and unreasonable. See Silver v. Rosenberg, 2 Cir., 1944, 139 F. 2d 1020; In re Ernst, 2 Cir. 1939, 107 F. 2d 760; 3 Collier, Bankruptcy, §62. 12 pp. 1483-1485 (14th Ed. 1941). We will not normally substitute our judgment for that of the referee and the Bankruptcy Court, see Silver v. Rosenberg, supra; In re Valentine, D. C. Md., 1956, 139 F. Supp. 576, and we are not persuaded that we should reject their determinations of the proper fees."

In the Matter of Carolina Scenic Stages, 242 Fed. 2d 263, the Court said:

"This appeal was taken by petitioners from an order of the District Judge, allowing them only $1, 250 for services in filing a petition in bankruptcy against

the Debtor under Chapter 10, 11 U. S. C. A. §501 et seq. They filed petitions for an allowance of $15,000, and the Referee recommended an allowance of $6,000. Judge Timmerman's order concludes: "The recommended fee is excessive. However, claimants are entitled to something from the estate. In the light of all the circumstances, considering the size of the estate and the number of creditors, a reasonable fee would be $1,250. Let claimants be paid $1,250." Claimants here insist that the District Judge erred in "holding that a reasonable fee is $1,250, and in failing to hold that the sum of $15,000, is a reasonable fee;" and in the alternative, that he erred "in failing to approve the fee of $6,000, recommended by the Referee." It is conceded that under Title 11 U. S. C. A. §641(5), the District Judge was authorized to allow petitioners a reasonable fee for filing the petition and necessarily the amount of such fee had to be left to his discretion. We come then to the question of whether we should in effect ignore the opinion of Judge Timmerman, and substitute our own. In answering, we obviously should bear in mind that he presided over the entire rather lengthy litigation involved in the Chapter 10 proceedings.

There are numerous cases holding that in such a situation the compensation found by the trial Judge to be reasonable should not be disturbed unless it is made

to appear that he abused his discretion or that he arrived at his conclusion by way of an erroneous view of the applicable legal principles.

In Calhoun v. Stratton, 6 Cir., 61 F. 2d 302, at page 303, the opinion sets forth: "Attorney fees cannot be fixed with mathematical certainty. They are to be determined in the exercise of judicial discretion. We cannot interfere unless there has been a clear abuse of discretion or an obvious mistake of law * * * " at page 304. "The statement of evidence embraces the opinion of eminent attorneys that the allowance to attorneys should have been larger, but it is not our province to pass upon the weight of the opinion testimony." In re Iron Clad Manufacturing Co., 2 Cir., 215 F. 877; In re Sovereign Corporation, 7 Cir., 114 F. 2d 1013."

The undisputed facts as to Blonder's services is that he did one day's work. No legal research was done by him. His plan obviously followed a form, and encompassed a proposed plan, which he was able to get out during the day. He did not even serve the restraining order. His proposed plan was rejected by the referee, bankruptcy was ordered to follow, and an order to sell the property in bankruptcy was made, based both upon his plan and another plan submitted after he got out of the case.

The trial judge's determination that his services were worth $250 is correct.

The statement of appellant that Morris Lavine was permitted to be the judge of the reasonable value of the appellants' services, is of course false on its face. As to Stimmel and Klein's services, Morris Lavine not only judged that they should receive nothing, but also return part of the $700 they received. The judge, however, allowed them to keep that $700 and gave them $350 more for worthless services.

As to Blonder, Mr. Lavine expressed no opinion as to the amount Blonder should receive, but only that it should be for the time spent, one day's services. Blonder's petition was supposed to accomplish something for $250, but these efforts would have come to naught, had the later adjudication remained.

IV

Under Point V appellants again misstate the facts. They say: "Reference is made to the order of October 21, 1957 in which the court stated that appellants Klein and Stimmel were not entitled to any compensation" for their services rendered prior to bankruptcy" etc., (App. Br. 69). The trial Court said no such thing. This is what the trial Court said:

> "The claims of Stimmel and Klein arose from transactions prior to the petition originally filed in this case on

January 5, 1956. Most of these services were not strictly legal in nature, but efforts toward refinancing the property. The size of the claim would warrant the court in rejecting it entirely. Fees may only be paid for services in aid of the administration of an estate, In re Owl Drug Co., 16 F. Supp. 139, 145. No contract was ever submitted in writing to this court or received its approval. Nothing appears that shows any particular benefit to the estate. From the testimony, it appears that the firm received $700.00 from Mrs. McAllister, the President of the corporation, prior to bankruptcy, which she has petitioned this Court to refund. The advances which Mr. Klein asserts were made to Mrs. McAllister will be offset against the $700.00 paid, and the remainder of the $700.00 may be kept by Stimmel and Klein for their services. In addition, the Court also awards them the sum of $350.00 to cover their services.

The sum of $250.00 is allowed to David Blonder for his services rendered."

Likewise under their Point VI they assert that the order of October 21, 1957 contains no findings of fact. The court's order clearly contains findings of ultimate fact and conclusions, and was sufficient compliance with Rule 52(c). Appellants did not object to the order for lack of findings, or request the

court for further findings, nor is their appeal based upon this ground, nor is it set up in their specification of errors and questions presented for decision. (Appellants Brief, Pages 51-2).

V

THERE WAS NO JURISDICTION OF APPELLANTS TO APPEAL FROM AN ORDER DENYING A TRUSTEE'S MOTION TO VACATE THE ORDER OF JUNE 25, 1957. THE APPEAL WAS NOT TIMELY FILED.

As we have heretofore pointed out, appellants at no time themselves ever made any motion to vacate the order confirming the plan of arrangement entered June 25, 1957. The motion was made by the trustee's attorney, not appellants, and never joined in by them. The trustee in effect abandoned the motion when it came up on September 10th and September 11, 1957, when the court made minute orders denying the trustee's motion to vacate the order confirming the plan on June 25, 1957. As money became available under the plan, appellants in open court themselves sought to take advantage of the plan to get some of it.

A single creditor, who does not himself make any motions or objections in the trial court, and file such objections in writing cannot step in to appeal from a denial of an order relating to a trustee's motion or anybody else's motion and carry on an appeal on that

basis, on something he did not himself raise in the trial court.

As we have heretofore pointed out, the judgment was valid in every respect. Appellants have confused, and attempted to confuse this court, between the relation between a stockholder and that of a corporation.

Miller v. McColgan, 17 Cal. 2d 432, 436

The order of the trial Court confirming the plan became final forty days after it was entered June 25, 1957. No appeal was taken from it by anyone. Motions to vacate, like motions for a new trial, motions to rehear, not made by the party appellants, in no event extend the time for them to appeal.

CONCLUSION

This is a case where the well-known example of the shield becoming a sword applies. The appellants were hired to act as a shield for the appellee corporation, to protect and preserve it. When their efforts failed they attempted to stab it, and by these proceedings use a sword to destroy, if possible, what they were hired to protect and preserve.

We respectfully pray that this court dismiss their attempted appeal from the orders denying the motion of the trustee to set aside the plan of arrangement and affirm

the orders of the trial court as to their attorney fees.

Respectfully submitted,

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